

**CERTIFIED FOR PUBLICATION**

THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

HYPERTOUCHE, INC.,

Petitioner,

v.

THE SUPERIOR COURT OF SAN  
MATEO COUNTY,

Respondent;

PERRY JOHNSON, INC.,

Real Party in Interest.

A108321

(San Mateo County  
Super. Ct. No. 418600)

**ORDER MODIFYING OPINION AND  
DENYING REHEARING  
[NO CHANGE IN JUDGMENT]**

**THE COURT:**

It is ordered that the published opinion filed herein on May 5, 2005, be modified as follows:

1. The first full sentence at the top of page 3 shall be modified to read as follows:

After plaintiff learned defendant had destroyed the database containing the phone numbers from which persons called to request that defendant cease sending facsimiles (the “do not fax database”), which was apparently done in the ordinary course of business, plaintiff issued subpoenas duces tecum to defendant’s telecommunication service providers, Global Crossing and Qwest Communications, requesting the phone numbers contained on the “do not fax database.”

2. The last sentence beginning on the bottom of page 10, and concluding on the top of page 11, shall be modified to read as follows:

The record indicates plaintiff promptly commenced aggressive discovery designed to identify the class, and that its failure was not one of effort but largely due to the fact that the “do not fax database” was no longer available,<sup>4</sup> and defendant’s

resistance to discovery of the “fax database” on the basis of the trade secret privilege.

3. The first full sentence at the top of page 27 shall be modified to read as follows:

After this action was filed, and apparently in the ordinary course of business, defendant destroyed information identifying the individuals and entities that had asked defendant to stop sending them unsolicited advertisements by telephone facsimile (the “do not fax database”), and also information identifying the number of unsolicited advertisements defendant sent.

There is no change in the judgment.

Respondent’s petition for rehearing is denied. Justice Haerle would grant the petition for rehearing.

Dated: \_\_\_\_\_

\_\_\_\_\_  
KLINE, P.J.